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Yong Yok Min v The Miri Municipal Council

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02–291 OF 1995
GOPAL SRI RAM, SITI NORMA YAAKOB AND HAIDAR JJCA
22 JUNE 2006

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Administrative Law — Exercise of administrative powers — Licence — License to prepare and sell food — Terms and conditions imposed on license — Stall holders required to trade personally at the stall — Condition 18 requires stall holders not to be absent from the stall for a continued period of five days in a week without prior permission from the respondent — Show cause notice of given under s 25(5) of the Local Authority Ordinance — Appellant's license revoked — Whether appellant challenged the reasonableness of condition 18 — Whether respondent adopted a reasonable and fair procedure in revoking license — Whether respondent's decision is Wednesbury unreasonableness — Whether appellant suffered an injustice

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The respondent issued a licence to the appellant to run a cooked food stall at the open market in Miri. That licence was subject to conditions. On 24 July 1993, the respondent issued to the appellant, a show cause notice pursuant to s 25(5) of the Local Authority Ordinance. The show cause notice asked the appellant to show cause why the appellant's licence should not be revoked and called for an explanation in that behalf. The appellant provided an explanation and the respondent did not accept

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the appellant's explanation as being reasonable. It was not in dispute that the licence contained a condition that the appellant be required to trade personally at the stall. There was also a condition 18 which required stall holders such as the appellant not to be absent from the stall for a continued period of five days in a week without prior permission from the respondent. It was common ground that no such permission was ever sought. Evidence was placed before the learned judge that from the inspection

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carried out by the respondent at the market, the appellant had failed to trade for the period 1 July 1993 to 7 October 1993 (both dates inclusive). This evidence was unchallenged. There was also no dispute that the appellant did not at any time seek the respondent's permission to engage the niece to run the stall.

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Held, dismissing the appeal:

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(1) The appellant did not challenge the reasonableness of condition 18. This was fatal to the appellant's case. The appellant did breach condition 18. And not only that. She also breached by-law 5(1) of the Miri District Council (Markets) By-Laws. In the light of these facts, the respondent acted reasonably in issuing the show cause notice. It was clear that having issued the show cause notice, the respondent did afford the appellant an opportunity to state her case. An oral hearing was not accorded. But that was not necessary (see paras 7–8).

(2) The respondent as the repository of the power to grant and to cancel licences adopted a reasonable and fair procedure having regards to the circumstances of this case (see para 9); *Mamat bin Talib (Timbalan Ketua Polis, Johor) & Anor v Abdul Jalil bin Rashid* [2006] 2 MLJ 108 followed.

(3) The decision to cancel or revoke the appellant's licence was not *Wednesbury* unreasonableness. The appellant had apparent no regard at all for the law. She was granted a licence and no sooner than the ink was dry on the paper she gets her niece to run the stall without obtaining the defendant's consent. Then the niece goes missing for several days thereby defeating the very object of the grant of the licence. A reasonable administrative body armed with these facts would have acted as the respondent did. The appellant suffered no injustice at all in this case (see para 9).

[Bahasa Malaysia summary

Responden telah mengeluarkan satu lesen kepada perayu untuk menjalankan gerai masakan makanan di pasar terbuka di Miri. Lesen tersebut tertakluk kepada beberapa syarat. Pada 24 Julai 1993, responden telah mengeluarkan kepada perayu, satu notis tunjuk sebab menurut s 25(5) Ordinan Pihak Berkuasa Tempatan. Notis tunjuk sebab itu bertanyakan kepada perayu untuk menunjukkan sebab kenapa lesen perayu tidak patut dibatalkan dan memanggil untuk satu penjelasan bagi maksud tersebut. Perayu telah mengemukakan satu penjelasan dan responden tidak menerima penjelasan perayu sebagai munasabah. Ia tidak dipertikaikan bahawa lesen tersebut mengandungi satu syarat bahawa perayu dikehendaki berniaga berseorangan di gerai itu. Terdapat juga satu syarat 18 yang menghendaki pemegang gerai seperti perayu yang perlu berada di gerai itu bagi tempoh berterusan selama lima hari seminggu tanpa persetujuan terdahulu daripada responden. Adalah alasan biasan bahawa tiada persetujuan telah dipohon. Keterangan telah dikemukakan di hadapan hakim yang bijaksana bahawa berdasarkan pemeriksaan yang dijalankan oleh responden di pasar tersebut, perayu telah gagal untuk berniaga untuk tempoh daripada 1 Julai 1993 hingga 7 Oktober 1993 (termasuklah kedua-dua tarikh tersebut). Keterangan ini tidak dicabar. Tiada juga pertikaian bahawa perayu tidak pada bila-bila masa meminta persetujuan responden untuk mengambil anak saudara perempuannya untuk menjalankan gerai tersebut.

Diputuskan, menolak rayuan tersebut:

(1) Perayu tidak mencabar kemunasabahan syarat 18. Ini memudaratkan kes perayu. Perayu telah melanggar syarat 18. Dan bukan itu sahaja. Beliau juga telah melanggar undang-undang kecil 5(1) Undang-Undang Kecil (Pasar-Pasar) Majlis Perbandaran Daerah Miri. Berdasarkan fakta-fakta tersebut, responden telah bertindak secara munasabah dalam mengeluarkan notis tunjuk sebab. Adalah jelas bahawa setelah mengeluarkan notis tunjuk sebab itu, responden telah memberikan perayu peluang untuk menyatakan kesnya. Satu perbicaraan lisan tidak diberikan. Namun itu tidaklah perlu (lihat perenggan 7–8).

(2) Responden sebagai pemegang kuasa wadah untuk memberi dan membatalkan lesen-lesen menggunakan prosedur yang munasabah dan adil berdasarkan keadaan kes ini (lihat perenggan 9); *Mamat bin Talib (Timbalan Ketua Polis, Johor) & Anor v Abdul Jalil bin Rashid* [2006] 2 MLJ 108 diikut.

(3) Keputusan untuk membatalkan lesen perayu bukanlah *Wednesbury* yang tidak munasabah. Perayu tidak langsung menghiraukan undang-undang. Beliau telah diberikan lesen dan terus memberikan anak saudara perempuannya mengendalikan gerai itu tanpa mendapat persetujuan defendan. Kemudian anak saudaranya menghilangkan diri untuk beberapa hari dan oleh itu menggagalkan objektif pemberian lesen tersebut. Satu badan pentadbiran munasabah yang mempunyai fakta-fakta berikut akan bertindak sepertimana responden telah lakukan. Perayu tidak mengalami apa-apa ketidakadilan langsung dalam kes ini (lihat perenggan 9).]

Notes

For cases on licence, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 79–80.

Cases referred to

Mamat bin Talib (Timbalan Ketua Polis, Johor) & Anor v Abdul Jalil bin Rashid [2006] 2 MLJ 108 (refd)

Legislation referred to

Local Authority Ordinance s 25(5)

Appeal from: Origiating Summons No MR3 of 1994 (High Court, Miri)

Tai Choi Yu (Tai Choi Yu & Co) for the appellant.
Lim Swee Huat (SH Lim & Co) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] The facts relevant to this appeal fall within a narrow compass. The respondent issued a licence to the appellant to run a cooked food stall at stall No 15 the open market in Miri. That licence was subject to conditions. On 24 July 1993, the respondent issued to the appellant a show cause notice pursuant to s 25(5) of the Local Authority Ordinance. The notice asked the appellant to show cause why the appellant's licence should not be revoked and called for an explanation in that behalf. The ground set out in the notice was as follows:

> You have been found not trading personally at your own stall for a long period.

[2] The appellant provided an explanation which we will address in a moment. What needs to be said for the present is that the defendant did not accept the plaintiff's explanation as being reasonable.

[3] Now, it is not in dispute that the licence contained a condition that the plaintiff be required to trade personally at the stall No 15. There was also a condition 18 which required stall holders such as the plaintiff not to be absent from the stall for a continued period of five days in a week without prior permission from the defendant. It is common ground that no such permission was ever sought. Evidence was placed before the learned judge that from the inspection carried out by the defendant at the market, the plaintiff had failed to trade for the period l July 1993 to 7 October 1993 (both dates inclusive). This evidence was unchallenged.

[4] The plaintiff's explanation for her absence from stall No 15 may be summarised thus. The business that was carried on at the stall consisted of the preparation, sale, service, removal and cleansing of the cooked food and tables and the necessary utensils and apparatus. From the very inception of the business, the plaintiff took on her niece Wong Nyuk Lan to assist her. She trusted Wong Nyuk Lan. The plaintiff also engaged two helpers to assist her on a daily basis to run the stall as it would have been impossible for her to attend alone to the work that was entailed. At the material time, her niece Wong Nyuk Lan was away to deliver her child.

[5] What emerges from the plaintiff's evidence is that she was never at any time personally present at stall No 15 and that she had in fact handed over the running of the stall to her niece. This, the defendant says was in direct contravention of by-law 5(1) of the Miri District Council (Markets) By-Laws which provides as follows:

> no stall-holder shall employ, engage or utilise the services of an assistant, whether paid or otherwise, except with the written permission of the Council.

And there is no dispute that the plaintiff did not at any time seek the defendant's permission to engage the niece to run the stall.

[6] Based on the material placed before him, the learned judge said:

> I am of the view that the terms and special conditions in the licence issued to the plaintiff, the Market By-Laws and the Ordinance are reasonable and fair. The provision in condition 18 in the special conditions (exh 'VTH1') that the plaintiff must not be absent for a continuous period of five days in a week is valid. The said condition 18 applies to all persons who want to earn a living by selling cooked food. There is no restraint of trade imposed by the defendant. If the plaintiff does not wish to continue to personally trade at stall No 15, she can find other jobs or work.

[7] Learned counsel for the plaintiff criticised the judge for making this finding. Since everything turned on the validity of condition 18, we asked learned counsel for the appellant whether the reasonableness of condition 18 had been challenged. He informed us that no such challenge had been taken. In our judgment, this is fatal to the plaintiff's case. To recall, her case is that her licence had been wrongfully revoked for breach of condition 18. But the short answer is that she did breach condition 18. And not only that. She also breached by-law 5(1). In the light of these facts, we think that the defendant acted reasonably in issuing the show cause notice.

[8] It is clear that having issued the show cause notice, the defendant did afford the plaintiff an opportunity to state her case. An oral hearing was not accorded. But that is not necessary. And for this purpose, all we need do is to reproduce what we said in *Mamat bin Talib (Timbalan Ketua Polis, Johor) & Anor v Abdul Jalil bin Rashid* [2006] 2 MLJ 108:

> We begin with what we consider to be the following well-established propositions:
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> (i) A decision by a public law decision-maker may be struck down by the courts on grounds of procedural unfairness or *Wednesbury* unreasonableness (see, *Anisminic Ltd v Foreign Compensation Commissio* [1969] 2 AC 14 7).
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> (ii) The content of procedural fairness is not fixed. It is a flexible concept and whether there has been procedural fairness in a given case depends on the facts and circumstances of that case. See, *The Board of Education of the Indian Head School v Knight* [1990] 1 SCR 65*: Haji All bin Haii Othman v Telekom Malaysia Berhad* [2003] 3 MLJ 29.
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> (iii) The essential requirements of an acceptable procedure is that it be fair and impartial. See, *B Surinder Singh Kanda v Government of the Federation of Malaya* [1962] 2 MLJ 169. Fairness includes, but is not confined to, the right to be heard which in some cases may be satisfied by the grant of a right to make written representations (*Ghazi bin Mohd Saw v Mohd Haniff bin Omar & Anor* [1994] 2 MLJ 114) whilst in others it can only be satisfied by an oral hearing. See, *Sentivelu v Public Services Commission* [2005] 5 MLJ 393.
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> (iv) The test to determine whether the particular procedure adopted in a given case was fair is subjective. The court must place itself in the shoes of the decision-maker and decide whether the procedure adopted provided adequate fairness to the person concerned. See, *Kioa v West* (1985) 159 CLR 550 where Brennan J said:
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> > What the principles of natural justice require in particular circumstances depends on the circumstances known to the repository at the time of the exercise of the power or the further circumstances which, had he acted reasonably and fairly, he would then have known. The repository of a power has to adopt a reasonable and fair procedure before he exercises the power and his observance of the principles of natural justice must not be measured against facts which he did not know and which he would not have known at the relevant time though he acted reasonably and fairly. As the obligation to observe the principles of natural justice is not correlative to a common law right but is a condition governing the exercise of a statutory power, the repository satisfies the condition by adopting a procedure which conforms to the procedure which a reasonable and fair repository of the power would adopt in the circumstances when the power is exercised. When the question for the court is whether the condition is satisfied, *the court must place itself in the shoes of the repository of the power to determine whether the procedure adopted was reasonable and fair*. (Emphasis added.)

[9] Applying settled principles of law, we are satisfied that the defendant as the repository of the power to grant and to cancel licences adopted a reasonable and fair procedure having regards to the circumstances of this case. The next question is whether the decision to cancel or revoke the plaintiff's licence is *Wednesbury* unreasonableness. Look at the facts. Here you have a plaintiff who has apparently no regard at all for the law. She is granted a licence and no sooner than the ink is dry on the paper she gets her niece to run the stall without obtaining the defendant's consent. Then the niece goes missing for several days thereby defeating the very object of the grant of the licence. In our judgment, a reasonable administrative body

armed with these facts would have acted as the defendant did. It is quite apparent that the plaintiff suffered no injustice at all in this case.

[10] For the reasons already given, the appeal was dismissed and those orders made which are usually consequent upon a dismissal.

Appeal dismissed.

Reported by Peter Ling